STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

ALAN JESPERSON,

Plaintiff-Appellant,

-vs-

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

_____/

Supreme Court No. 150332

Court of Appeals No. 315942

Macomb County Circuit Court No. 11-006160-NO

PLAINTIFF-APPELLANT'S REPLY BRIEF

CERTIFICATE OF SERVICE

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellant
2684 Eleven Mile, Suite 100
Berkley, MI 48072
(248) 546-4649

LAW OFFICES OF MICHAEL J. MORSE, PC

ERIC M. SIMPSON (P57232)
LEWIS A. MELFI (P73854)
Attorneys for Plaintiffs-Appellant
24901 Northwestern Highway, Suite 700
Southfield, Michigan 48075
(248) 350-9050

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I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT DEFENDANT DID NOT WAIVE ITS STATUTE OF LIMITATIONS DEFENSE BY FAILING TO PLEAD AS REQUIRED BY MCR 2.111(F).

The first issue on which the Court requested briefing in its April 1, 2015 order granting leave to appeal concerns ACIA's failure to preserve its statute of limitations defense by failing to raise it properly in its affirmative defenses. ACIA suggests that it complied with MCR 2.111(F) because it "specifically cited" MCL 500.3145(1) in its affirmative defenses. In "specifically citing" that statutory provision, ACIA actually *conceded* that it did not have a statute of limitations defense. ACIA indicated in its affirmative defenses that "*since notice was given, or payment has been previously made*, Plaintiff may not recover benefits for any alleged expenses incurred more than one (1) year before the date on which the action was commenced, pursuant to MCL 500.3145(1)." Affirmative Defense #3 (App. 57a) (emphasis added). Thus, in raising the one-year-back rule of §3145(1) in its affirmative defenses - a defense that is inapplicable in this case - ACIA managed to admit that it was not claiming the limitations defense that is now at issue "since notice was given or payment has been previously made."

Since ACIA was compelled by the Michigan Court Rules to state the facts supporting its statute of limitations defense, MCR 2.111(F)(3), its failure to do so constitutes a waiver of that defense. *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008).

Plaintiff acknowledges that ACIA's waiver of its statute of limitations defense could be corrected by an amendment of its affirmative defenses. But, as even ACIA acknowledges in its brief to this Court, Def's Brf. at 18, fn. 9, the decision to allow such an amendment rested with the circuit court, not the Court of Appeals. Moreover, as ACIA concedes in footnote 8 of its brief, the circuit

court was presented with an oral request to allow such an amendment, but the circuit court did not expressly rule on that request.

But, after conceding that the circuit court did not expressly decide its request to amend, ACIA contends that the circuit court "constructively" granted that request in deciding the summary disposition motion that ACIA filed. The fact is that the record in this case provides no basis for concluding that the circuit court ever exercised its discretion in allowing an amendment of the affirmative defenses. For all we know, the circuit court may, instead, have reached the merits of ACIA's motion by accepting ACIA's baseless argument that it did, in fact, comply with MCR 2.111(F).

ACIA further suggests that Mr. Jesperson would suffer no prejudice as a result of an amendment of its affirmative defenses. This issue of whether prejudice exists is part of the calibration of whether such an amendment should be allowed. Thus, the question of whether Mr. Jesperson would be prejudiced by the amendment of the affirmative defenses is not for this Court (or the Court of Appeals) to decide. This is a decision that belongs to the circuit court in exercising its discretionary decision-making as to whether ACIA should be permitted to amend its affirmative defense.

Contrary to the argument that ACIA raises, the circuit court could, when confronted with this issue, determine that Mr. Jesperson would be prejudiced by the late amendment of ACIA's affirmative defenses. The Michigan Court Rules call for a statute of limitations defense to be raised at an early stage in the proceedings or that defense is waived. Here, Mr. Jesperson and his counsel spent 19 months litigating this case, going through discovery, case evaluation, facilitation and preparation for trial. In light of the investment in time and money that plaintiff made in this case as

well as the tardiness of ACIA's claim to a statute of limitations defense on the even of trial, the circuit court could conclude that plaintiff would at this point be prejudiced by the amendment of ACIA affirmative defenses. The point is, however, that this is a decision that belongs to the circuit court.[1]

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT MR. JESPERSON'S CAUSE OF ACTION WAS BARRED BY THE ONE YEAR LIMITATIONS PERIOD PROVIDED IN MCL 500.3145(1).

The substantive issue raised in this case concerns the appropriate interpretation of the first two sentences of §3145(1). This Court has emphasized repeatedly that this interpretation is to be controlled by the words of the statute: "The role of the Court in interpreting statutory language is to 'ascertain the legislative intent that may reasonably be inferred from the words in a statute.'" *Hannay v Dept of Transportation*, 497 Mich 45, 57; 860 NW2d 67 (2014). When a statute is unambiguous, "the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. Nor further judicial construction is required or permitted." *Madygula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014).

Despite this Court's emphasis of the primacy of statutory text, the arguments that ACIA has offered as to the appropriate interpretation of §3145(1) are heavily weighted to what it perceives to be the "policy", the "goal" or the "purpose" of the no-fault act. Thus, the bulk of the arguments that

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[1]ACIA further asserts that plaintiff has not argued that it would be an abuse of discretion for the circuit court to grant a motion to amend its affirmative defenses. In light of the highly deferential appellate review standard governing discretionary decisions, *see Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), it is perhaps true that if the circuit court were to allow ACIA to amend its affirmative defenses, that decision would withstand appellate challenge. But, it is equally true that if the circuit court *denied* ACIA's request to amend, that decision would also not be reversed on appeal since it would not constitute an abuse of discretion.

ACIA offers the Court are not addressed to the true focus of this case - the actual text of §3145(1).

ACIA begins (and basically ends) its analysis of the text of §3145(1) by announcing that this statute requires that "something happen within one year" after a motor vehicle accident takes place. According to ACIA, one of three events must take place within one year of the accident for a claimant to bring a timely suit for no-fault benefits:

> Either the claimant must provide written notice to the carrier *within that year*, the claimant must file suit *within that year*, or the carrier must make a payment *within that year*.
>
> Defendant's Brief, at 1 (emphasis in original).

The serious textual difficulty that confronts ACIA in this case is that §3145(1) explicitly provides that two of the three events that it cites *must* occur within one year of the accident. MCL 500.3145(1) specifies that an action may not be commenced more than "1 year after the date of the accident" and it further provides an exception to that rule where written notice has been provided to the insurer within "1 year after the accident." But, §3145(1) does not tie the third event that ACIA cites - the exception to the one year statute based on the payment of no-fault benefits - to the period within one year after the accident.

This is the fundamental textual problem with ACIA's position. Like the Court of Appeals, ACIA must assume that a word inserted by the Michigan Legislature in the exception at issue in this case - "previously" - means exactly the same thing as the phrases used two other times in the same sentence - 1 year after the accident. Since a court cannot assume that "the Legislature inadvertently made use of one word or phrase instead of another . . ." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2007), the assumption underlying ACIA's position in this case is not tenable.

The only other purely textual argument that ACIA raises in its brief to this Court is the

suggestion that its legal position is supportable under the "last antecedent rule." Def's Brf, at 30-32. The last antecedent rule is a principle of statutory construction providing that a modifying or restrictive word in a statute is confined solely to the immediately preceding clause. *Duffy v Michigan Dept of Natural Resources*, 490 Mich 198, 220-221; 805 NW2d 399 (2011); *Hardaway v Wayne County*, 494 Mich 423, 427; 835 NW2d 336 (2013).

This rule of interpretation cannot be applied here. The clause that immediately precedes the exception to the one year limitations period where an insurer makes a payment of no-fault benefits is the other exception to the one year statute of limitation. These two exceptions are separated by the disjunctive "or." Under the traditional interpretive rules discussed in plaintiff's original brief, the use of the word "or" in this context means that these two exceptions must be construed as independent alternatives. *People v Kowalski*, 489 Mich 488, 499, n. 11; 803 NW2d 200 (2011).

The clause to which the "payment" exception refers, therefore, is the initial clause of §3145(1), the clause that contains the verb "commenced." It is that word that the adverb "previously" refers to. ACIA grants that this construction of the first sentence of §3145(1) has some "surface appeal," Def's Brf. at 31, but it suggests that this construction would render the word "previously" surplusage.

This argument has no merit. Constructing the second exception to the one-year limitations period as applicable to payments made previously, *i.e.* prior to the commencement of the action, means that a payment made by an insurer *after* a suit is instituted would not except a claim from the one-year statute of limitations.

The remainder of ACIA's arguments veer off into its personalized assessment of the goals, purposes or policies behind the no-fault act and its insistence that these goals, purposes and policies

would only be served by a decision in its favor. But, the "policy" behind the act "cannot prevail over what the text actually says." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). And, "courts are not to speculate about on unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Gladcych v New Family Homes*, *Inc*., 468 Mich 594; 664 NW2d 705 (2003); *cf Titan Ins Co v Hyten*, 491 Mich 547, 565; 817 NW2d 562 (2012) (rejecting a particular policy-based reading of the no-fault act on the ground that "it is the policy of this state that all of the provisions of the no-fault act be respected.")

The wisdom of these cases eschewing recourse to the "policy" behind a atatute is reflected in the fact that rather than choosing the "goals" and "purposes" offered in support of ACIA's arguments, the Court could just as easily adopt the view that "the goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Such a "goal", it should be noted, would be well served by a decision in Mr. Jesperson's favor.

ACIA's insistence on addressing the purported "purpose" as opposed to the text of §3145 is particularly evident in its extended critique of plaintiff's position on the ground that it would "open the door" to payment of potentially unlimited benefits. Def's Brf., at 2-4. First, it should be noted that this Court has recognized that §3145(1) has two time limitations on the filing of a suit for no-fault benefits as well as one temporal limitation on the recovery of damages. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 574; 702 NW2d 539 (2005); *Welton v Carriers Ins Co*, 421 Mich 571, 576; 365 NW2d 170 (1984). Two of these temporal limitations - the requirements that suit be

commenced within one year of the most recent loss and the one year back limitation on damages[2] - would remain in place in this case even if the Court were to reverse the grant of summary disposition in favor of ACIA.

Moreover, ACIA's policy-based argument that reversal of the Court of Appeals decision could potentially lead to the payment of lifetime benefits overlooks the fact that precisely the same thing is true of the other exception to the one-year statute of limitations mentioned in the first sentence of §3145. In other words, where the plaintiff mails a notice that complies with §3145(1) within one year of the accident, the insurer is at least *potentially* responsible for the payment of lifetime benefits.[3]

The effect of both of the exceptions to the one year limitations period found in the first

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[2]The continuing applicability of these two remaining temporal restrictions leaves one perplexed at several comments that find their way into ACIA's brief. ACIA represents at one point that a victory for Mr. Jesperson in this appeal would mean that his claim in the future *"would not be subject to any statute of limitations*." Def's Brf., at 4 (emphasis in original). This statement is incorrect. Moreover, at a number of points in its brief, ACIA insists that a vote against Mr. Jesperson in this case is necessary to avoid requiring it to defend against "stale" claims. In light of the fact that under §3145 the most stale claim that could ever be pursued against ACIA would be one-year old, this is not a particularly accurate or forceful argument against Mr. Jesperson's legal position.

[3]In light of the way that the one-year notice exception operates, yet another of defendant's attempts to divine legislative intent proves to be wrong. ACIA asserts that its interpretation of §3145(1) has to be correct became only its position "carries out the legislative intent that the *potential* for PIP claims at some point be foreclosed under a certain period of time after the accident occurs." Def's Brf, at 5. But, if that really were the intent behind §3145(1), neither exception to the one year statute of limitations would be contained in the first sentence of that statute. Moreover, this particular stab at ascertaining legislative intent does not even coincide with ACIA's position in this case. ACIA is not really arguing that §3145(1) sets up a system in which PIP claims will at some point be foreclosed within a certain period of time after the accident occurs. What ACIA actually argues is that payment of benefits by an insurer will, in fact, leave open the potential for payment of no-fault benefits *outside* the one year anniversary of the accident as long as that payment is made within one year after the accident occurs.

sentence of §3145(1) is the same. It does not advance the defendant's position appreciably to suggest that Mr. Jesperson's argument with respect to the application of one of these two exceptions would lead to a result that is somehow anomalous or inconsistent with legislative design.

Finally, ACIA attempts to argue that adoption of Mr. Jesperson's position would jeopardize the no-fault act's goal of prompt payment of benefits. ACIA would apparently have this Court believe that the investigation that a no-fault insurer would be required to conduct before making payment on a claim would be so onerous that it would result in the delay in the payment of benefits.

While plaintiff cannot comment on the "investigative" process in every other case, it is pretty obvious what this investigation would have entailed here. Mr. Jesperson submitted an application for no-fault benefits to ACIA on a standard form. (App. 17a-25a). At the very top of the very first page on that form there are four boxes. (App. 17a). These four boxes, it turns out, were actually typed in by someone working for ACIA, before the form was sent to Mr. Jesperson who hand wrote the remainder of that form.

Two of these boxes at the top of the first page of that form are of particular interest in terms of the argument that ACIA has offered. The first of these two is the date that the form was completed; the second is the date of the accident. The typewritten date on the form was August 12, 2010. *Id*. The accident date was correctly identified as May 12, 2009. *Id*.

The rather simple fact is that this top line of the first page of Mr. Jesperson's Application for Benefits contained all the information that ACIA needed to "investigate" whether his claim for benefits was timely. Since the date of the application happened to be more than one year after the date of the accident, ACIA's agents had all of the information they needed to determine whether this application for benefits was "timely" for purposes of §3145(1). In light of the information that was

right in front of the defendant's agents, it is difficult to see why a thorough and thoughtful "investigation" into the timeliness of Mr. Jesperson's claim for benefits would take a particularly long time or how, in the appropriate case, such an investigation could possibly delay the payment of no-fault benefits.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellant, Alan Jesperson, respectfully requests that this Court reverse the Court of Appeals September 16, 2014, decision and remand this matter to the Macomb County Circuit Court for further proceedings.

MARK GRANZOTTO, P.C.
/s/ Mark Granzotto
MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellant
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

LAW OFFICES OF MICHAEL J. MORSE, PC
/s/ Eric M. Simpson
ERIC M. SIMPSON (P57232)
LEWIS A. MELFI (P73854)
Attorneys for Plaintiff-Appellant
24901 Northwestern Highway, Suite 700
Southfield, Michigan 48075
(248) 350-9050

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